NO. 21353

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHNNY SABBATH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in both counts of a two-count indictment, at the conclusion of trial by jury [C. T. 2-3, 5]. 1/

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28,

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1/ "C. T." refers to the Clerk's Transcript of Record.

United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in both counts of a two-count indictment returned by the Federal Grand Jury for the Southern District of California. Count One charged that appellant and William Edward Jones, also known as William Dale, knowingly imported and brought approximately one ounce of cocaine, a narcotic drug, into the United States from Mexico, in violation of Title 21, United States Code, Section 173 [C. T. 2].

Count Two charged that appellant and Jones knowingly concealed and facilitated the transportation and concealment of, approximately one ounce of cocaine, a narcotic drug, which, as they then and there well knew, had been imported and brought into the United States contrary to law [C. T. 3].

Jury trial of appellant commenced on June 16, 1966, before United States District Judge Fred Kunzel [R. T. 5]. 2/ Appellant was found guilty as charged on the same date [C. T. 5]. Thereafter, on July 25, 1966, appellant was committed to the custody of the Attorney General for ten years upon each count, to run concurrently [C. T. 4]. He thereafter filed a timely notice of appeal [C. T. 7].

2/ "R. T." refers to the Reporter's Transcript on Appeal.

III

ERROR SPECIFIED

Appellant specifies the following points upon appeal:

1. Alleged error in denying the motion to strike evidence seized following an arrest.

2. Alleged error in denying the motion to strike evidence obtained as a result of an alleged unlawful entry into appellant's apartment.

3. Alleged error in permitting improper evidence upon rebuttal (Opening Brief of Appellant, p. 5).

IV

STATEMENT OF FACTS

On February 19, 1966, William Jones, also known as William Dale, was arrested at San Ysidro, California [R. T. 10, 13-14 29, 32]. On the previous day, Jones had gone from Los Angeles to Mexico with appellant in appellant's 1965 Cadillac automobile [R. T. 20, 29, 32]. Before they left Los Angeles, appellant agreed to give $100 to Jones if he would bring a package back to the United States and deliver it to appellant in Los Angeles [R. T. 16, 29].

In Mexico appellant gave Jones a package and left [R. T. 28-29]. It was stipulated that a chemist would testify that the package contained approximately one ounce of cocaine [R. T. 13-15,

124-25].

After Jones entered the United States from Mexico as a pedestrian at San Ysidro on February 19, he was searched by officers. The package was found in his shorts [R. T. 10, 12, 14-15, 35].

Jones also had a small card containing a telephone number, 758-9794, and the name, "Johnny". Jones placed a telephone call to that number in Los Angeles, in the presence of officers at approximately 3:00 P. M. on February 20. Appellant answered the phone [R. T. 107-09].

Jones referred to the party at the other end as "Johnny", identified himself as "B. J." and said that he was still in San Diego and that he still had his thing. The party on the other end asked if Jones had any trouble getting through the line. Jones replied, "No", and the other party said, "Well, I had a little bit of trouble down there, but I'll tell you about that when I see you". Jones asked him if he was going to be home, and he replied, "Yes". Jones said, "All right; I'm on my way up. I'll see you in a little while." [R. T. 110-11].

After United States Customs Agent David W. Hopkins received information from other agents who had questioned Jones, he participated in the placing of a radio transmitter upon Jones. Then Jones and Customs officers proceeded to appellant's apartment in Los Angeles [R. T. 42, 44-45, 59, 111]. Jones was trying to assist the officers [R. T. 38-39].

Appellant heard a knock on the door. A lady friend

answered the knock and asked, "Who is it?" Jones replied, "B. J." Appellant told his friend to let him in, and she let Jones come into the apartment [R. T. 85-86].

Jones gave the package to appellant. Agent Hopkins listened to portions of the conversation by using the radio device [R. T. 21, 45]. He heard Jones' voice when he asked whether Johnny was in. A female voice replied, "Yes; just a minute". Agent Hopkins heard footsteps. He heard a male voice ask Jones whether he had any problems getting through the line. Jones replied that he had no trouble. There was conversation about the trip and how Jones got to Los Angeles [R. T. 46].

Part of the conversation was not audible to Agent Hopkins, but he heard conversation about a "package". He decided to enter the apartment:

> "I knocked on the door, waited a few seconds, and no answer came from within, so I opened the unlocked door and came into the apartment." [R. T. 47].

It was approximately 7:30 P. M. on February 20, about five minutes after Jones entered the apartment [R. T. 43, 47]. The officers did not have a warrant [R. T. 56].

After the officers entered, Agent Hopkins and another officer both observed that appellant had his hand underneath the cushion of the couch upon which he was seated. Appellant and Jones were arrested. The arrest of Jones was for his own protection. Customs Port Investigator Honore looked underneath the cushion upon which appellant had been seated and found a rubber

contraceptive resembling the package that had been carried across the border by Jones [R. T. 50-52, 114-16].

The apartment was searched. A box containing small rubber balloons, rubber bands, and aluminum foil cut into squares was found in a closet. Another box with numerous small rubber balloons was found in the kitchen. About $500 in cash was between the mattress and innersprings in the bedroom. Approximately 300 Dexamyl tablets were in a dresser drawer in the bedroom [R. T. 117].

Customs Port Investigator Donald R. Carter testified that in his opinion the aluminum foil squares were to be used to carry narcotics in five-milligram quantities. He testified that aluminum foil squares are generally used for cocaine. He also testified that many narcotic dealers use balloons and rubber bands to hold the narcotics. It was stipulated that Carter was an expert witness [R. T. 112, 114 118, 119].

Appellant's motion to suppress evidence was denied [R. T. 61-62].

Appellant testified that he had no agreement with Jones concerning the importation of cocaine, that he did not promise to give $100 to Jones, and that he did not give Jones a package containing cocaine [R. T. 76-77, 90].

He testified that he went to Mexico with Jones to see the dog races, that he drove the car, and that Jones talked about narcotics and left him [R. T. 70-72].

Appellant also testified that he later grabbed a brick to

strike a suspicious-looking "Spanish fellow" "because he looked like he was going to jump on me", and the man pulled out a pistol and yelled "Policia", three times. Then, according to appellant, someone took him to the police station, where an officer "knocked me around", and attempted to take appellant's money, which amounted to approximately $400 or $500, before releasing him with his money [R. T. 73-74, 76].

Appellant also testified that he returned to Los Angeles; that he talked to Jones on the telephone; and that he had purchased the balloons for his son who resided elsewhere [R. T. 65-66, 76, 87, 122]. At one point he testified that he did not know what the aluminum foil squares (found with the balloons) were for. Later he testified that the "pieces of tinfoil", were used to prevent contact between carpets and furniture during his carpet-cleaning work [R. T. 95, 122-23].

V

ARGUMENT

A. THE OFFICERS HAD PROBABLE CAUSE TO ARREST APPELLANT.

Appellant contends that his motion to strike evidence should have been granted upon the ground that the officers did not have probable cause to arrest appellant. This argument involves evidence seized as the fruit of the search of appellant's apartment incident to his arrest.

The officers had a considerable quantity of information prior to the moment that Agent Hopkins made the entry into the apartment.

William Jones had been arrested after entering the United States from Mexico with a container of cocaine, a narcotic drug, in his shorts [R. T. 12, 13-15]. Customs officers found the contraband [R. T. 34-35]. After some delay, Jones told the officers that appellant had asked him to come down there and bring the package back [R. T. 36]. A card containing a telephone number and the name, "Johnny", was in the possession of Jones [R. T. 108-09].

At approximately 3 p. m. on February 20 (the following day), Jones dialed the telephone number that was on the card with the name, "Johnny". This was done in the presence of two Customs officers [R. T. 10-12, 108-09].

Appellant answered the phone. Jones referred to the other party as "Johnny", identified himself as "B. J.", and said "that he was still in San Diego and that he still had his thing, and the party on the other end asked if he had any trouble getting through the line". Jones replied that he did not, and the other party said, "Well, I had a little bit of trouble down there, but I'll tell you about that when I see you" [R. T. 110, emphasis added]. Jones asked the other party if he was going to be home and received the reply, "yes". Then Jones said, "All right; I'm on my way up. I'll see you in a little while." [R. T. 111].

Customs officers proceeded to appellant's apartment in Los Angeles after Customs Agent Hopkins received information from the other agents who had questioned Jones. A radio

transmitter was placed upon Jones, who was attempting to assist the officers [R. T. 38-39, 44-45, 59].

Jones knocked on the door of the apartment. Appellant told a friend to let him enter. Agent Hopkins, who was listening by using the radio device, had heard Jones' voice when he asked whether Johnny was in. He heard a female voice reply, "Yes, just a minute". He heard steps and heard a male voice asking, "Did you have any problems getting through the line?", or words to that effect. He heard Jones reply in the negative, and then there was the sound of music [R. T. 45-46, 85-86].

Agent Hopkins heard additional conversation about the trip and how Jones got to Los Angeles. Part of the conversation was not audible, but Agent Hopkins heard someone inside mention the word "package". He decided to enter the apartment. The loud music was interfering with the radio reception [R. T. 46-47].

It is respectfully submitted that Agent Hopkins had abundant probable cause for the arrest of appellant. Jones had stated that appellant had asked him to bring the package back. The package contained cocaine, a narcotic drug. The statements of Jones were corroborated by (1) his possession of appellant's telephone number with the name "Johnny"; (2) his call to that telephone number and conversation with a "Johnny" about "the thing"; (3) appellant's question as to whether Jones had any trouble getting "through the line" (obviously referring to the International boundary, the most dangerous point in a Mexico-Los Angeles narcotics trip); (4) appellant's statement to the effect that he, appellant, had been

"down there" (indicating that it was a very recent trip); (5) appellant's later question as to whether Jones had any problems "getting through the line" (overheard by use of the radio device); and (6) the mention of the word "package".

While all that was required was " 'a reasonable ground for belief of guilt' ", which means less than sufficient evidence to justify conviction, [3] Agent Hopkins had far more than this.

In Rodgers v. United States, 267 F. 2d 79 (9th Cir. 1959), Customs officers made an arrest of a woman in San Diego after acting upon information originally furnished by one Martinez who had been placed in custody after crossing the international boundary at San Ysidro. Martinez stated that the woman, E. Nadine Rodgers, would be waiting in San Diego and would have heroin that had been purchased in Tijuana. There were some corroborating features, including the false statement by Mr. Rodgers, who had a narcotics record and said that Mrs. Rodgers would not be in San Diego; the fact that Mrs. Rodgers was found in San Diego near the location described by Martinez; the fact that Martinez was a heroin user and knew some narcotics agents in San Francisco; and some other minor factors. This Court held that there was probable cause for the arrest of Mrs. Rodgers:

> "Martinez, although unknown to the arresting officers at the time he was taken into custody and therefore unreliable, had by the time the arrest was made

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3/ Rodgers v. United States, 267 F. 2d 79, 85 (9th Cir. 1959).

proved to be reasonably reliable." (at p. 88).

Appellant cites Castillon v. United States, 298 F. 2d 256 (9th Cir. 1962). In that case, the corroborating facts did not approach the level of the corroborating circumstances in the instant appeal.

In this case, as in Rodgers, supra, there was sufficient corroboration of the statements of the arrested person to "warrant a prudent man in believing that the offense has been committed". 4/ Indeed, no other conclusion would have been reasonable. In order to be falsifying, and in order to wrongfully set the stage for the incriminating telephone conversation, Jones would have had to be blessed with the gall of a carnival pitchman and the magic of a Merlin. A prudent man would have had no hesitation in reaching a sincere belief that appellant had committed a Federal offense.

B. THE QUESTION OF THE MEANS OF ENTRY INTO APPELLANT'S APARTMENT MAY NOT BE RAISED IN THIS APPEAL.

Appellant contends that the officers unlawfully entered his apartment by failing to state their authority and purpose and failing to await a refusal of admittance.

Appellant did not raise this issue in the trial Court as part

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4/ The language is from Henry v. United States, 361 U.S. 98, 102 (1959).

of his motion to suppress evidence [R. T. 61-62] and did not raise the question at any time during the trial. Consequently, he is precluded from raising this new issue at this time.

Jones v. United States, 362 U.S. 257, 272 (1960);

United States v. Monticallos, 349 F. 2d 80, 82 (2nd Cir. 1965);

Robinson v. United States, 327 F. 2d 618, 623 (8th Cir. 1964).

In Robinson, supra, the appellant moved to suppress the evidence upon the claim that the evidence was unlawfully seized but did not raise the issue of alleged failure to make an announcement before entry. His later attempt to raise the new issue upon appeal was unsuccessful:

> "The prosecution therefore was not challenged about the arrest, showed only such facts as led to the search, was under no necessity of offering evidence in justification and explanation of the entry, and in effect was lulled into an assumed security which the defense would now make false. We, of course, do not know from this record what the government would or could have proved by way of explanation and justification. We do feel that, under the circumstances of this case, the defense is not now in a position to complain by afterthought. If an arrest and the search and the discovery of evidence are to be challenged on appeal, that challenge must be made in the first instance in the trial court.

Fairness to that court and to counsel and to a reviewing court demands this. So do fair 'procedural requirements.' This presents no 'plain error'or Rule 52(b) situation for there may be no error at all. Somewhere the rights of the public and the rightful demands of orderly criminal procedure deserve protection, too."

Robinson, supra, at p. 623.

The essential logic of this rule readily appears in the light of the general rule to the effect that the burden rests upon the defendant to establish the fact that evidence was illegally obtained.

Addison v. United States, 317 F. 2d 808, 812-13 (5th Cir. 1963), cert. den. 376 U. S. 905 (1964);

Wilson v. United States, 218 F. 2d 754, 757 (10th Cir. 1955);

Jaraba v. United States, 158 F. 2d 509, 513, note 3 (1st Cir. 1946).

If a party does not raise an issue in the trial court, it is very unlikely that he will satisfy the burden of proof.

C. ASSUMING ARGUENDO THAT APPELLANT MAY NOW RAISE THE NEW ISSUE OF ANNOUNCEMENT BEFORE ENTRY, THE ANNOUNCEMENT WAS NOT REQUIRED BECAUSE THERE WAS NO "BREAKING".

Assuming, for purposes of argument, that appellant may now raise the new question of the alleged failure of officers to make a proper announcement before entering the apartment to arrest appellant, the announcement rule does not apply because there was no "breaking". Agent Hopkins merely opened an unlocked door [R. T. 47].

Appellant cites Miller v. United States, 357 U.S. 301 (1958), and Wong Sun v. United States, 371 U.S. 471 (1963). Miller involved a Federal search warrant statute (18 U.S.C.A. 3109) which provided that an officer may "break open" 5/ a door under appropriate circumstances. Officers entered the apartment by ripping off the door chain which was holding the door (at pp. 303-04). In Wong Sun, it was stipulated "that the door was broken and splintered around the lock".

Wong Sun v. United States, 288 F.2d 366, 368, note 1 (9th Cir. 1961), reversed, 371 U.S. 471.

This Court has held that where officers "simply opened an unlocked door and entered without objection" (after knocking and

5/ California Penal Code Section 844 uses the words, "break open the door", in connection with arrest procedures.

receiving no response), they "did not break any doors or in any other manner perpetrate a forceful entry". The Court also stated: "In the instant case there was no forceful entry as there was in Miller."

Williams v. United States, 273 F. 2d 781, 793-94 (9th Cir. 1959), cert. den. 362 U. S. 951 (1960).

In United States v. Bowman, 137 F. Supp. 385 (C. A. D. C. 1956), officers entered an unlocked front door of a building for the purpose of serving a search warrant. The defendant maintained that the officers did not make the required announcement. The Court rejected the claim, holding that the officers did not "break open" the door and stating this proposition of law:

> "So long as the entry is peaceful and there is no breaking of parts of the house, the execution of the search warrant is legal." (at p. 388).

Bowman is cited as authority in Ng Pui Yu v. United States, 352 F. 2d 626, 632 (9th Cir. 1965), and Leahy v. United States, 272 F. 2d 487, 489 (9th Cir. 1959), cert. dismissed, 364 U. S. 945 (1961). The conclusion that a peaceful entry does not constitute a breaking is fully consistent with the history of the announcement rule. The latter rule originated with the purpose of avoiding unnecessary injury to private property.

49 Cal. Law Review 474, 502-03 (1961).

It is self-evident that doors and locks would be unnecessarily

damaged by smashing through in order to make an arrest where a mere request might result in a permissive entry. However, the question of damage does not appear where the officer merely turns the doorknob. 6/

Bowman was not followed in the majority opinion in Keiningham v. United States, 287 F. 2d 126 (C. A. D. C. 1960). In that case two circuit judges stated:

> "We think that a person's right to privacy in his home (and the limitation of authority to a searching police officer) is governed by something more than the fortuitous circumstance of an unlocked door, and that the word 'break' as used in 18 U. S. C. § 1309, means 'enter without permission.' " (at p. 130).

However, the opinion does not consider the fact that the encroachment upon the right to privacy in the home resides in the authority to enter in order to make an arrest, not in the possibility of entering without making an announcement. By the time that the announcement becomes necessary, the absolute right to privacy in the home no longer exists, because the officers already have the right to enter in order to make an arrest. The language of the majority opinion in Keiningham was criticized by this Court in Ng Pui Yu, supra, at p. 632; is inconsistent with this Court's holding in Hopper v. United States, 267 F. 2d 904, 908 (9th Cir. 1959) (in which the

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6/ Although the announcement rule has been extended to include cases of entry through use of a key, it is questionable whether there should be additional extension of a rule that has been criticized as "a dangerous anachronism".
49 Cal. Law Review 474, 502 (1961).

entry was without permission and there was no refusal of admittance); and was discussed and not followed in United States v. Conti, 361 F. 2d 153, 157 (2nd Cir. 1966), and United States v. Williams, 351 F. 2d 475, 477, note 3 (6th Cir. 1965), cert. den. 383 U. S. 917 (1966).

D. ASSUMING ARGUENDO THAT THERE WAS A "BREAKING", APPELLANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED.

Since appellant did not raise the announcement issue in the trial Court, it is not surprising that there is no evidence to support the conclusion that the officers failed to state their authority and purpose before entering.

Appellant speculates that the officers did not make the announcement because Agent Hopkins, one of four officers who were at the door, did not mention such an announcement in his narrative of events [R. T. 47]. Such speculation cannot substitute for evidence.

Furthermore, there are two additional reasons for rejecting appellant's claim that the evidence should have been suppressed.

Exigent circumstances justified a prompt entry without waiting for appellant to open the door. In addition, the discovery of the evidence was not the "fruit" of the failure to make the announcement and await refusal of admittance.

In absence of an applicable Federal statute, state law is

controlling upon the question whether a proper procedure is employed before breaking open a door in order to make an arrest.

Williams v. United States, supra, at pp. 792-93;

Miller, supra, at pp. 305-06;

Ker v. California, 374 U.S. 23, 39 (1963);

Jackson v. United States, 354 F.2d 980, 981 (1st Cir. 1965).

Since there is no applicable Federal statute here, California Penal Code Section 844 is controlling.

Ker, supra, at pp. 37-39;

Williams, supra, at pp. 792-93.

Under Section 844, noncompliance with the announcement rule is permissible where exigent circumstances are present.

Ker, supra, at pp. 37-39;

Williams, supra, at p. 793.

A similar exception applies to 18 U.S.C.A. 3109 (the statute involved in Miller, supra).

Gilbert v. United States, 366 F.2d 923, 931-32 (9th Cir. 1966).

The exigent circumstances in the instant case included the severe risk to the cooperating defendant, Jones. Once the officers knocked and announced their purpose, it would have become obvious to appellant that Jones, who had entered a few minutes previously, was cooperating with the officers to set the stage for appellant's arrest. It was a distinct possibility that the suspect would attempt to take his revenge upon Jones while the officers were patiently

awaiting a refusal of admittance.

Retaliation upon informants is not a rare phenomenon. In Hurst v. United States, 344 F. 2d 327 (9th Cir. 1965), this Court stated:

> "That disclosure of an informant's name, particularly in a border-crossing case involving narcotics, can have grave consequences is a truism."

Another court has also considered the risks that an informant must take:

> "The Court takes judicial knowledge of a number of informers that have appeared in his court who have been murdered or foully treated."
>
> United States v. Estep, 151 F. Supp. 668, 673 (N. D. Texas 1957).

In the same opinion, the Court mentioned the murders of a number of Federal informants, accomplished by various means, including stabbing, machine gun fire, drowning, throat-cutting, and head-smashing.

As a result of the breakdown in the radio transmission, the officers were powerless to protect Jones unless they entered quickly, since they did not know what was happening inside. Having enlisted Jones as an ally in the fight against the narcotics traffic, the officers had a moral obligation to protect him. Consequently, they were not required to comply with the requirements of Section

844. Even the minority opinion in Ker, supra, recognized the need for prompt action where risks of bodily harm are present. After mentioning a possible exception in the case of escape and hot pursuit, the minority opinion added (at p. 55):

> "But no exceptions have heretofore permitted unannounced entries in the absence of such awareness on the part of the occupants -- unless possibly where the officers are justified in the belief that someone within is in immediate danger of bodily harm." (Emphasis added).

Appellant notes that exigent circumstances may justify noncompliance with an announcement statute in some cases and that these circumstances include the necessity to aid one in peril. However, he states that Agent Hopkins entered because he was not getting good radio reception, not in order to avoid one of the problems involved in the exigent circumstances rule (Opening Brief of Appellant, p. 12). It is true that Agent Hopkins testified that they decided to enter because they were not getting good radio reception [R. T. 47]. However, this was merely one link in the chain of causation. He was not asked why the lack of radio reception created a necessity for entry. It is obvious that he did not enter in order to listen to the Sabbath-Jones conversation.

Furthermore, assuming arguendo that the method of entry was not excused by the existence of exigent circumstances, the evidence would be admissible, because the evidence was not the

"fruit" of the alleged illegality. Had the officers made an announcement and awaited a permissive entry or refusal of admittance, the evidence would have been seized. Jones was inside and could observe any attempt by appellant to hide the package.

> " 'Suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he complied with section 844.' "
>
> Ker, supra, at p. 23.

The same rule appears in Williams, supra, at p. 793, and in People v. Carrillo, 64 Cal. 2d 387, 391 (1966). Since the officers would have obtained the evidence anyway, the seizure was not the "fruit" of the manner of entry.

E. THE ADMISSION OF REBUTTAL EVIDENCE DID NOT CONSTITUTE ERROR.

Appellant maintains that the trial Court erroneously admitted improper rebuttal testimony regarding balloons and aluminum foil squares.

In the case in chief, Agent Hopkins testified that aluminum squares and small rubber balloons were found in two rooms in appellant's apartment [R. T. 60]. Appellant testified that the balloons were for his child [R. T. 65-66]. On cross-examination,

appellant testified that he did not know what the aluminum squares were for [R. T. 95]. Investigator Carter testified in rebuttal that balloons and aluminum foil squares were found in the same box and that in his opinion, the aluminum squares and balloons were to be used for narcotics. He testified that the aluminum squares are generally used for cocaine. It was stipulated that he was an expert [R. T. 114, 117-19].

The evidence in regard to the use of balloons was proper rebuttal evidence which served the function of impeaching appellant's claim that the balloons were for his child. The evidence relating to the use of the aluminum squares (which were found with the balloons, in the same box) was proper rebuttal evidence serving the purpose of impeaching appellant's previous testimony to the effect that he did not have the faintest idea what the aluminum squares were for [R. T. 95]. Appellant overlooks the latter testimony when he states:

> "The defendant presented absolutely no evidence as to the use or purpose of the tinfoil squares . . . . But with nothing having been said regarding the tinfoil squares, there was no basis to permit evidence on rebuttal regarding the squares."
> (Opening Brief of Appellant, pp. 13-14).

Furthermore, appellant failed to object to the rebuttal testimony in a timely fashion. No objection was made until the conclusion of a ten-minute recess which followed the conclusion

of the witness' testimony and the release of the witness. Appellant's counsel then made a motion to strike all of the testimony of the witness as improper rebuttal [R. T. 118, 120].

> "An objection to the introduction of testimony must be made at the earliest possible opportunity after the objection becomes apparent or it will be held to have been waived."
>
> 88 C. J. S., p. 237.

This rule has been applied to the objection that evidence is improper rebuttal.

> 88 C. J. S., p. 241.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment in the Court below should be affirmed.

Respectfully submitted,

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PHILLIP W. JOHNSON,
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Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Phillip W. Johnson

PHILLIP W. JOHNSON